

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

ROBERT A. BRUCE,

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Petitioner,

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No. 08-640V

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Special Master Christian J. Moran

v.

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SECRETARY OF HEALTH
AND HUMAN SERVICES,

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Filed: March 3, 2010

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Respondent.

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Ruling on entitlement, transverse
myelitis (TM), acute disseminated
encephalomyelitis (ADEM),
influenza vaccine, entitlement,
respondent does not contest.

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David L. Terzian, Rawls & McNelis, P.C., Richmond, VA, for petitioner;

Ryan D. Pyles, United States Dep't of Justice, Washington, D.C. for respondent.

UNPUBLISHED RULING ON ENTITLEMENT*

On September 10, 2008, Dr. Robert A. Bruce filed a petition for compensation alleging that he began experiencing multiple, severe, progressive, neurological abnormalities, compatible with transverse myelitis (TM) and/or acute disseminated encephalomyelitis (ADEM) and related sequelae as a result of an influenza vaccine, which he received on October 12, 2005. He seeks compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 *et seq.* (2006).

Respondent has chosen not to contest entitlement. Respondent stated that although respondent does not believe that this case is appropriate for compensation under the terms of the

* Because this unpublished ruling contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

Vaccine Act, respondent believes that an entitlement hearing would not be an efficient use of Program resources and thus moves for a ruling on the record as it now stands. Respondent states that petitioner has no objection to this motion. Resp't Mot., filed Jan. 7, 2010.

Special masters may determine whether a petitioner is entitled to compensation based upon the record. A hearing is not required. 42 U.S.C. § 300aa-13; Vaccine Rule 8(d).

Although the Vaccine Act contains a table in which certain injuries are presumed to be caused by certain vaccines, Dr. Bruce may not take advantage of any presumption because the flu vaccine is not associated with any injury. 42 C.F.R. § 100.3(a); see also 70 Fed. Reg. 19092 (adding trivalent influenza vaccine to the table). Under these circumstances, a petitioner bears the burden of establishing that the flu vaccine caused the injury for which she seeks compensation. Althen v. Sec'y of Health and Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). To prove causation in fact, a petitioner must establish at least three elements. The petitioner's

burden is to show by preponderant evidence that the vaccination brought about [the] injury by providing: (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury.

Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Proof of medical certainty is not required; a preponderance of the evidence suffices. Bunting v. Sec'y of Health & Human Servs., 931 F.2d 867, 873 (Fed. Cir. 1991).

Under the statute, a special master may not grant compensation based solely on the petitioner's allegations. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. 42 U.S.C. § 300aa-13(a)(1).

Dr. Bruce was a 57-year-old ophthalmologist at the time he received a flu vaccination on October 12, 2005. Exhibit 5 at 11. Dr. Bruce experienced some numbness in his left leg and the left side of his face approximately 5 days after the vaccination. Exhibit 1 at 1; exhibit 7 at 1. On October 23, 2005, Dr. Bruce was hospitalized at Riverside Methodist Hospital with the differential diagnoses of Guillain-Barre syndrome, suspected Brown-Sequard syndrome, and transverse myelitis secondary to flu vaccine. After an extensive evaluation, including multiple physician evaluations, blood work, CT scans, MRI, and a lumbar puncture, findings supported diagnoses of transverse myelitis and acute disseminated encephalomyelitis (ADEM). Exhibit 6 at 39-40, 43-44, 46.

Dr. Bruce was discharged from the hospital on October 28, 2005, but returned approximately three weeks later when his symptoms worsened. Dr. Bruce stayed at the hospital for three weeks until he was finally discharged. Exhibit 1 at 1; exhibit 6 at 48-59, 69-74.

Although Dr. Bruce's condition has improved over time, he continues to experience problems with strength, steadiness, memory, and reading comprehension. Exhibit 1 at 2. At this time, Dr. Bruce has been unable to return to work. Exhibit 1 at 1.

A preponderance of the evidence supports a finding that Dr. Bruce has satisfied all of the Althen prongs. Persuasive evidence comes from the expert report of Dr. Avindra Nath, a neurologist, who opined that Dr. Bruce had ADEM that was caused by his receipt of the flu vaccination on October 12, 2005. Exhibit 16.

Dr. Nath set forth a medical theory known as molecular mimicry. Molecular mimicry has been accepted as a reliable theory in the Vaccine Program as a way to explain how some vaccines can cause some injuries.

The second prong from Althen is "a logical sequence of cause and effect showing that the vaccination was the reason for the injury." On this point, Dr. Bruce again relies on Dr. Nath's opinion. Dr. Bruce's evidence on the second prong is reinforced by a statement of a Dr. Hurwitz, a neurologist who treated Dr. Bruce. Dr. Hurwitz stated that Dr. Bruce had a "severe disseminated encephalomyelitis episode presumably the result of the flu vaccine." Exhibit 11 at 2.

The third prong from Althen is the temporal association. The interval between the vaccination and the onset of Dr. Bruce's symptoms was approximately five days. Dr. Nath stated that case reports of ADEM following several vaccinations, including influenza vaccine, recognized a 1-3 week temporal association. Dr. Nath stated that Dr. Bruce's initial symptoms which occurred five days after vaccination is consistent with the temporal relationship in these cases. Id.

Respondent has opted not to contest this matter further by obtaining an expert or by challenging the evidence contained in the record. Therefore, after considering the evidence, the undersigned finds that petitioner has established that he is entitled to compensation.

A status conference is set for **Monday, March 15, 2010, at 3:00 P.M. Eastern Time.** The parties should be prepared to discuss whether life care planners will be needed to determine the amount of compensation to which Dr. Bruce is entitled. The Office of Special Masters will initiate the call. Any questions may be directed to my law clerk, Francina Segbefia, at (202) 357-6358.

IT IS SO ORDERED.

S/ Christian J. Moran

Christian J. Moran
Special Master